No. 16,200

United States Court of Appeals

For the Ninth Circuit

JOHN O. ENGLAND, Trustee of the Estate of J. J. Kimble, Bankrupt,
Appellant,

vs.

AMERICAN TRUST COMPANY,
Appellee.

On Appeal from the United States District Court for the Northern District of California, Southern Division.

APPELLANT'S OPENING BRIEF.

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STATEMENT AS TO JURISDICTION.

J. J. Kimble was adjudged a bankrupt on March 16, 1956, on a petition filed by him on March 15, 1956, and further proceedings were duly referred to the Honorable Burton J. Wyman, Referee in Bankruptcy of the United States District Court for the Northern District of California, Southern Division, at San Francisco in said District.

Appellant John O. England was elected trustee of the bankrupt estate on April 11, 1956. On September 14, 1956, appellee American Trust Company filed its specification of objections to the discharge of the

bankrupt and on October 31, 1956, after a hearing held the same day, the opposition to the bankrupt's discharge was submitted for decision. On August 22, 1957, an order was made denying the bankrupt's discharge based upon said specification (R. 8). On February 21, 1957, appellee filed its proof of claim under Sections 62 and 64-a(3) of the Bankruptcy Act for the sum of $771.50 representing attorneys' fees in the sum of $750.00 and costs in the amount of $71.50 expended by it in preparing and prosecuting its objections to the bankrupt's discharge (R. 3). Appellant trustee on October 30, 1957, filed his objections to said claim (R. 9). A stipulation as to the facts in connection with said claim was thereupon entered into by the parties and approved by the referee (R. 11) and on November 14, 1957, a hearing on said objections was had before the referee (R. 15). On March 27, 1958, the referee made his order disallowing appellee's proof of claim (R. 24-32). Appellee filed its petition to review said order (R. 13-14) which was reversed by the District Court which ordered that appellee be reimbursed for attorneys' fees in an amount to be fixed by the referee in bankruptcy (R. 39-42).

Pursuant to the provisions of 11 U.S.C.A. 47, appellant filed his notice of appeal on August 7, 1958 (R. 44), from said order. Pursuant to the order of the District Court, the referee on July 23, 1958 made his order fixing the sum of $250.00 as reasonable compensation for the attorneys for appellee in opposing the bankrupt's discharge (R. 43-44), and on August 20, 1958, the District Court ordered payment of said

attorneys' fees (R. 45-46). Appellant also filed a timely notice of appeal on September 18, 1958 (R. 46-47), from this order. The jurisdiction of this court to hear the appeals is founded on Section 47 of Title 11 of the United States Code (11 U.S.C.A. Sec. 47).

STATEMENT OF FACTS.

The bankrupt had given a financial statement to the American Trust Company, appellee, for the purpose of securing a loan. After examination in the bankruptcy proceeding, it appeared that such statement was in some respects false. Appellee thereupon caused specification of objections to the bankrupt's discharge to be filed and after hearings thereon, the referee refused to grant a discharge.

Appellee did not, before filing such objections, either request appellant trustee to do so nor did it ask for permission from the referee to file such objections.

In the process of successfully opposing the bankrupt's discharge, appellee incurred attorneys' fees in the sum of $750.00 and costs amounting to $71.50, and filed its proof of claim therefor with the referee in bankruptcy (R. 3-7).

Appellant thereupon filed objections to the allowance of such claim, which objections were sustained by the referee (R. 24-32). After petition for review of said order, the District Court directed the referee to fix reasonable compensation to the attorneys for appellee (R. 39) and eventually $250.00 was ordered paid to appellee (R. 45-46).

QUESTION PRESENTED.

1. Whether the appellee should have first requested the trustee of said bankrupt estate to oppose the bankrupt's discharge, or secured authority from the court to do so itself, and, not having done either, is it entitled to reimbursement from the bankrupt estate of attorneys' fees incurred by it in successfully opposing said bankrupt's discharge?

STATUTES INVOLVED.

Section 47a of the Bankruptcy Act (11 U.S.C.A., Sec. 75a(9)):

> "Trustees shall . . . (9) oppose at the expense of estates the discharges of bankrupts when they deem it advisable to do so. . . ."

Section 64a(3) of the Bankruptcy Act (11 U.S.C.A., Sec. 104):

> "The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be . . .
>
> (3) Where the confirmation of an arrangement or wage-earner plan or the bankrupt's discharge has been refused, revoked or set aside upon the objection and through the efforts and at the cost and expense of one or more creditors, or, where through the efforts and at the cost and expense of one or more creditors, evidence shall have been adduced resulting in the conviction of any person of an offense under Chapter 9 of Title 18 of the United States Code, the reasonable costs and

expenses of such creditors in obtaining such refusal, revocation, or setting aside, or in adducing such evidence."

ARGUMENT.

APPELLEE SHOULD NOT BE ENTITLED TO REIMBURSEMENT FROM THE BANKRUPT ESTATE OF ATTORNEYS' FEES INCURRED BY IT IN SUCCESSFULLY OPPOSING THE BANKRUPT'S DISCHARGE, WHERE IT FAILED TO REQUEST THE TRUSTEE TO TAKE SUCH ACTION, OR TO SECURE AUTHORITY FROM THE COURT TO DO SO ITSELF.

Prior to 1938 a trustee in bankruptcy could oppose a bankrupt's discharge only if thereunto authorized at a special meeting of the creditors. Since 1938 Section 47a of the Bankruptcy Act (11 U.S.C.A., Sec. 75a(9)) lists as one of the duties of the trustee that he shall oppose the discharge of the bankrupt when he deems it advisable to do so. Section 14b (11 U.S.C.A., Section 32(b)) now authorizes opposition by the trustee, creditors, the United States Attorney, or such other attorney as the Attorney General may designate.

In this instance, appellee had in its possession a financial statement of the bankrupt given by him in order to secure credit, and which, after testimony and evidence presented to the court by appellee's attorneys, proved to be false and thus became the basis for objecting to the bankrupt's discharge. The statement was not submitted to the trustee or his attorney, and appellee at no time requested the trustee to perform the duty of opposing the discharge. See statement of stipulated facts (R. 11-13).

If such a request had been made and the trustee had refused to comply, it is conceded that appellee would be free to proceed and eventually be reimbursed from the estate for its expense in successfully opposing this bankrupt's discharge.

But, as is said in *Remington on Bankruptcy,* Fifth Edition, sec. 2268, Volume 6:

> "Where the receiver or trustee is wholly failing to perform his functions and refuses to take steps or initiate proceedings necessary to protect or bring in assets, an attorney for creditors who takes required action successfully may be compensated out of the estate. A creditor's attorney, if he hopes to be paid out of the estate for taking over and performing the trustee's duties, should at least first make a demand on the trustee, and probably should likewise obtain leave of court."

No case has been found construing the 1938 amendment to Sec. 64a(3) of the Bankruptcy Act under circumstances similar to the facts heretofore recited.

The question of the reasonableness of the amount allowed appellee as attorneys' fees is not involved herein. What is, is the fact that if the lower court's decision is upheld, the referee and trustee virtually lose their respective right of administration of a bankrupt estate. Ordinarily, fees are not granted to an attorney, accountant or auctioneer from an estate unless authority for their employment has been given by the court (General Orders in Bankruptcy Nos. 44 and 45). The reason is simple and self-evident, namely, the referee thus retains control of the admin-

istration of an estate and is in a position to limit expenditures or fees payable from the estate.

> "For administrative reasons Congress has wisely provided that the trustee shall have sole responsibility for administering the estate. The courts have therefore held that a creditor may be paid the costs of recovering hidden assets only when he has acted before a trustee is appointed or after the trustee, having been told of the hidden assets, has refused to take action". *In re Joslyn* (C.C.A. 7) 224 F. (2d) 223, 225.
>
> "If any creditor, petitioning or other, learns facts which lead him to suppose that property has been concealed, he may, and indeed he should, advise the receiver to stir him to action. The referee or the judge may thus authorize the creditor to proceed, and he will be entitled to his reward under section 64b(2), but not otherwise." *In re Eureka Upholstering Co. Inc.* (C.C.A. 2) 48 F. (2d) 95, 96.

As the referee said in his certificate (R. 35) the denial of a bankrupt's discharge does not benefit the bankrupt estate:

> "Seemingly, it is not to be overlooked herein, considered from a factual, as well as from the legal aspect of the situation, the aforesaid unauthorized-by-the-court independent action thus taken by the aforesaid creditor-bank, not only brought no benefit whatsoever to the herein bankrupt's estate, but conversely was of benefit to said creditor-bank, inasmuch as said action resulted in the removal of the legal barrier that the bankruptcy proceeding theretofore had raised against said creditor-bank and at the same time paved

> the way for said creditor-bank to proceed to collect its claim from the bankrupt who no longer is protected by his bankruptcy proceeding."

There are seven grounds for opposing a discharge (Sec. 14c (U.S.C.A. Section 32(c)). It could be that seven different creditors could file specifications of objections to the discharge of a bankrupt, each one based upon one of the seven, but different, grounds. The result, if the court were by-passed, would be a multiplicity of objections and hearings with consequent attorneys' fees and costs, all to the eventual and general detriment of creditors generally of the bankrupt estate. It is therefore felt, as the referee stated, that if any allowance is made to appellee under the circumstances heretofore related,

> "a precedent would be established that later, under circumstances the same as those present herein, frequently could, and (inasmuch as said precedent almost certainly would assure, out of bankrupts' estates, the payment of attorneys' fees to attorneys not appointed by the bankruptcy courts to represent anyone officially connected with bankruptcy proceedings involved) in all likelihood, frequently would, be used to justify like 'by-passings' of the bankruptcy courts, and their protective supervision over the administration of bankruptcy estates, and the funds therein involved, thereby weakening, if not making entirely ineffective, the supervision that Congress unquestionably intended should be exercised by bankruptcy courts in administering bankruptcy proceedings. In passing it is to be noted that the supervisory power of a referee in bankruptcy

matters has been referred to by the Circuit Court of Appeals for the Ninth Circuit as 'sweeping.' " *Lines v. Falstaff Brewing Co.,* 233 F. (2d) 927, 931.

CONCLUSION.

The order of the court below dated July 10, 1958, reversing the order of the referee in bankruptcy herein, and its order dated August 20, 1958, directing payment of attorneys' fees to appellee, should be set aside, and the order of the referee in bankruptcy of March 27, 1958, should be affirmed.

Dated, San Francisco, California,
February 6, 1959.

Respectfully submitted,
STANLEY M. MCLEOD,
Attorney for Appellant.